

Kuwait Finance House (M) Bhd v JRI Resources Sdn Bhd & Ors A

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-584-09 OF 2013 B
CHOO KAH SING J
17 MAY 2021

Banking — Guarantee and indemnity — Proof of indebtedness — Whether certificate of indebtedness was sufficient — Whether witness had personal knowledge of documentary evidence C

Civil Procedure — Judgment — Res judicata — Issues raised in previous courts — Whether defendants precluded from raising new issues — Whether issues raised and argued amounted to res judicata D

The plaintiff's claim against the first defendant was premised on a string of Islamic financing facilities agreements entered into between the parties; whereas the plaintiff's claims against the second to fourth defendants were premised on two directors' guarantee and indemnity agreements given to the plaintiff by the said defendants in relation to the Islamic financing facilities. The first defendant had defaulted in the repayment of the Islamic financing facilities offered by the plaintiff. Likewise, the second to fourth defendants had also defaulted in making payment to the plaintiff upon demands made against them by the plaintiff's solicitors. On 2 September 2013, the plaintiff initiated this suit against the defendants. The plaintiff sought for summary judgment to be entered against the defendants. On 3 October 2014, the earlier High Court allowed the plaintiff to enter summary judgment against all the defendants ('the summary judgment'). Dissatisfied with the High Court's decision, the defendants appealed to the Court of Appeal ('CA'). One of the issues relied on by the defendants was whether the plaintiff was permitted under Shariah to transfer the obligation to pay for the major maintenance works of two vessels, to the first defendant. The defendants challenged cl 2.8 of the *Ijarah* agreements which provided that the customer, ie the first defendant, shall undertake all the major maintenance work and bear all the costs, charges and expenses therein, as not Shariah compliance, and therefore, the plaintiff was not entitled to its claim in respect of the *Ijarah* rentals when the vessels were out of service. The first defendant also alleged that since the plaintiff had failed to carry out and pay the major maintenance work of the vessels, as a result, the vessels were out of service. Consequently, the first defendant could not pay for the *Ijarah* rentals. The CA set aside the summary judgment and remitted the matter back to the High Court. When the matter was remitted back to the High Court before a different judge, a reference was made to the Shariah E
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- A Advisory Council ('the SAC') pursuant to s 56 of the Central Bank of Malaysia Act 2009 on 18 May 2016. The reference was in respect of the question raised in para (b) of the CA's order. On 30 June 2016, the SAC answered the question in the positive, ie cl 2.8 was Shariah compliant. Pursuant to s 57 of the Central Bank of Malaysia Act 2009, the SAC's ruling was binding on the High Court.
- B The first defendant was not satisfied with the ruling of the SAC, and filed a referral application to challenge the constitutionality of ss 56 and 57 of the Central Bank of Malaysia Act 2009. The High Court dismissed the referral application on 22 August 2016. The first defendant filed an appeal to the Court of Appeal. The Court of Appeal allowed the appeal and ordered the High Court to refer the constitutional question to the Federal Court. On 28 August 2018, the Federal Court heard the referral application, and on 10 April 2019 decided, inter alia, by a majority that ss 56 and 57 of the Central Bank of Malaysia Act 2009 were valid and constitutional. After exhausted all its legal avenues, the first defendant had failed in its challenge against the legality of the Islamic financing agreements. The first defendant did not proceed to defend the plaintiff's claim at the High Court. On 23 September 2020, the plaintiff and first defendant entered a consent judgment for a sum of RM87,388,654.20 as at 30 March 2018. Consequently, the plaintiff's claims in the main suit to be tried by the High Court were confined to the plaintiff's claims against the second to fourth defendants in relation to the liability under the guarantees. With regard to the first defendant's counterclaim, the High Court proceeded to hear the counterclaim together with the plaintiff's claims against the second to fourth defendants. Hence, the issues that arose, inter alia, was: (a) whether the court must take into account and consider the conduct of the parties throughout the process of the agreements to determine whether the plaintiff had acted in bad faith and/or unconscionably which could estop the plaintiff from seeking the reliefs claimed; (b) whether the plaintiff's sole witness had personal knowledge of the documentary evidence; (c) whether the defendants were precluded from raising new issues to be tried at the High Court because the CA had set aside the whole decision of the previous High Court, ie the summary judgment; and (d) whether there were merits to the first defendant's counterclaim.
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- H **Held**, allowing the plaintiff's claim against the second to fourth defendants and dismissing the first defendant's counterclaim:
- I (1) The court could not agree with the defendants' counsel submission, because article 2(o) of the guarantees provided a conclusive evidence clause referring to a statement or certificate of indebtedness of the sum owing. As long as the certificate of indebtedness had been duly certified by the plaintiff's authorised officer it shall suffice to prove the amount stated therein as owing to the plaintiff by the guarantors, ie the second to fourth defendants. The second to fourth defendant did not disprove the amount in the certificate of indebtedness at the trial. Further, the court

could not agree that the court should examine the conduct of the parties throughout the process of the agreements to determine whether the plaintiff had acted in bad faith in relation to the plaintiff's action against the second to fourth defendant as the guarantors and principal debtors. If the court were to examine the conduct of the parties, the court would have engaged itself in issues which were outside of the ambit of the CA's order. The issue to be tried in the High Court was confined to that direction in the CA's order, as the ruling of the CA bound the High Court (see paras 20–22).

- (2) It was trite law that as long as the witness was able to obtain his/her knowledge from the contemporaneous documents which he/she had access to, and that he/she was tasked to take charge of the matter in his/her course of employment, this would suffice to say that the witness could have acquired sufficient knowledge based on the contents and information extracted from those documents to give evidence in court. It was not necessary that a witness must have actual personal knowledge over certain documents in order to be qualified to give evidence in court in relation to those documents, particularly when a party to the documents was a corporation or financial institution. This was because the employee or officer handling the documents could have retired or could no longer be in the employment when a dispute arose from the said documents. The court was of the considered view that the defendants were attempting to raise issues which were outside the purview of the court. Hence, the complaint raised by the second to fourth defendants was unsustainable (see para 23).
- (3) This court was of the considered view that when the matter was remitted back to the High Court, the Court of Appeal had clearly confined the High Court to only one issue to be tried, ie whether cl 2.8 of the *Ijarah* agreements was Shariah compliant. In the event the defendants, including the fourth defendant, were not satisfied with ruling of the CA's order to limit the issue to be tried when the plaintiff's case was remitted back to the High Court, then they could have sought leave to appeal against the CA's order. In so far as the High Court was concerned, the issue to be tried was limited to that as stated in the CA's order. Further, the issue in question had in fact been answered by the SAC. Therefore, it was correct for the plaintiff to say that the plaintiff was entitled to enter judgment against the second to fourth defendants without need to hear the evidence of the second to fourth defendants. The second to fourth defendants could not raise any other issue and had to abide by the ruling in the CA's order (see paras 26–27).
- (4) The court was of the view that even if the earlier High Court and the CA had considered the three issues, they had considered them in the context of the summary judgment as triable issues or otherwise. The merits of the

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A three issues had not been finally decided by the CA. Hence, res judicata did not apply. After considering the evidence before the court on the three issues raised in the first defendant's counterclaim, the court was not convinced that the first defendant had proved its claim on a balance of probabilities. (see paras 32–33).

B **[Bahasa Malaysia summary]**

C Tuntutan plaintif terhadap defendan pertama adalah berdasarkan beberapa perjanjian kemudahan pembiayaan Islam yang dimeterai antara kedua-dua pihak; manakala tuntutan plaintif terhadap defendan kedua hingga keempat adalah berdasarkan jaminan dua pengarah dan perjanjian ganti rugi yang diberikan kepada plaintif mengenai kemudahan pembiayaan Islam. Defendan pertama telah gagal dalam membuat pembayaran balik kemudahan pembiayaan Islam yang ditawarkan oleh plaintif. Begitu juga, defendan kedua hingga keempat juga telah gagal dalam membuat pembayaran kepada plaintif

D atas tuntutan yang dibuat terhadap mereka oleh peguam plaintif. Pada 2 September 2013, plaintif memulakan saman ini terhadap defendan. Plaintif memohon penghakiman terus dibuat terhadap defendan. Pada 3 Oktober 2014, Mahkamah Tinggi sebelum ini membenarkan plaintif memasukkan penghakiman terus terhadap semua defendan ('penghakiman terus'). Tidak

E berpuas hati dengan keputusan Mahkamah Tinggi, defendan merayu kepada Mahkamah Rayuan ('MR'). Salah satu isu yang bergantung kepada defendan adalah sama ada plaintif dibenarkan di bawah Syariah untuk memberikan kewajipan untuk membayar kerja-kerja penyelenggaraan utama dua kapal tersebut kepada defendan pertama. Defendan telah mencabar klausa 2.8

F perjanjian *Ijarah* yang memperuntukkan bahawa pelanggan, iaitu defendan pertama, hendaklah menjalankan semua kerja penyelenggaraan utama dan menanggung semua kos, caj dan perbelanjaan di dalamnya sebagai tidak mematuhi prinsip Syariah. Oleh itu, plaintif tidak berhak untuk menuntut sewa *Ijarah* apabila kapal-kapal tersebut tidak berfungsi. Defendan pertama

G juga mendakwa bahawa sejak plaintif gagal menjalankan dan membayar kerja penyelenggaraan utama kapal, akibatnya, kapal-kapal tersebut tidak berfungsi. Akibatnya, defendan pertama tidak dapat membayar sewa *Ijarah* tersebut. MR mengenyepikan penghakiman terus tersebut dan mengembalikan kes untuk didenagr semula di Mahkamah Tinggi. Apabila perkara tersebut di dengar

H semula di Mahkamah Tinggi di hadapan hakim yang berbeza, rujukan telah dibuat kepada Majlis Penasihat Syariah ('MPS') menurut s 56 Akta Bank Negara Malaysia 2009 pada 18 Mei 2016. Rujukan tersebut berkenaan dengan soalan yang dibangkitkan di dalam perenggan (b) perintah MR. Pada 30 Jun 2016, MPS memutuskan bahawa klausa 2.8 adalah patuh Syariah. Menurut

I s 57 Akta Bank Negara Malaysia 2009, keputusan MPS mengikat Mahkamah Tinggi. Defendan pertama tidak berpuas hati dengan keputusan MPS, dan memfailkan permohonan rujukan untuk mencabar keperlembagaan ss 56 dan 57 Akta Bank Negara Malaysia 2009. Mahkamah Tinggi menolak permohonan rujukan tersebut pada 22 Ogos 2016. Defendan pertama

memfailkan rayuan ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan itu tersebut dan memerintahkan Mahkamah Tinggi untuk merujuk soalan perlembagaan ke Mahkamah Persekutuan. Pada 28 Ogos 2018, Mahkamah Persekutuan mendengar permohonan rujukan tersebut, dan pada 10 April 2019 memutuskan, antara lain, dengan majoriti bahawa ss 56 dan 57 Akta Bank Negara Malaysia 2009 adalah sah dan berperlembagaan. Setelah menggunakan semua hak undang-undangnya, defendan pertama telah gagal dalam cabarannya terhadap kesahihan perjanjian pembiayaan Islam tersebut. Defendan pertama tidak meneruskan pembelaannya di Mahkamah Tinggi. Pada 23 September 2020, plaintif dan defendan pertama telah membuat penghakiman persetujuan bagi jumlah RM87,388,654.20 pada 30 Mac 2018. Oleh itu, tuntutan plaintif dalam saman utama yang akan dibicarakan oleh Mahkamah Tinggi adalah terhad kepada tuntutan plaintif terhadap defendan kedua hingga keempat berhubung dengan liabiliti di bawah surat jaminan pengrah tersebut. Berhubung dengan tuntutan balas defendan pertama, Mahkamah Tinggi meneruskan untuk mendengar tuntutan balas bersama-sama dengan tuntutan plaintif terhadap defendan kedua hingga keempat. Oleh itu, isu-isu yang timbul, antara lain, adalah: (a) sama ada mahkamah harus mengambil kira dan mempertimbangkan kelakuan pihak-pihak sepanjang proses perjanjian untuk menentukan sama ada plaintif telah bertindak dengan niat buruk dan/atau secara tidak sengaja menghalang plaintif daripada mendapatkan relif yang dituntut; (b) sama ada saksi tunggal plaintif mempunyai pengetahuan peribadi mengenai bukti dokumentari itu; (c) sama ada defendan telah dihalang daripada membangkitkan isu-isu baru untuk dibicarakan di Mahkamah Tinggi kerana MR telah mengeneipkan keseluruhan keputusan Mahkamah Tinggi yang terdahulu, iaitu penghakiman terus tersebut; dan (d) sama ada terdapat merit di atas tuntutan balas defendan pertama.

Diputuskan, menolak tuntutan plaintif terhadap defendan kedua hingga defendan keempat dan menolak tuntutan balas defendan pertama:

- (1) Mahkamah tidak dapat bersetuju dengan hujahan peguamcara defendan-defendan, kerana perkara 2(o) jaminan tersebut merupakan klausa bukti konklusif yang merujuk kepada pernyataan atau perakuan keterhutangan jumlah yang terhutang. Selagi perakuan keterhutangan telah disahkan oleh pegawai yang diberi kuasa oleh plaintif, sudah cukup untuk membuktikan jumlah yang dinyatakan di dalamnya sebagai terhutang kepada plaintif oleh penjamin, iaitu defendan kedua hingga keempat. Defendan kedua hingga keempat tidak membantah jumlah dalam sijil hutang di dalam perbicaraan. Selanjutnya, mahkamah ini tidak dapat bersetuju bahawa mahkamah harus memeriksa kelakuan pihak-pihak sepanjang proses perjanjian untuk menentukan sama ada plaintif telah bertindak dengan niat buruk berhubung dengan tindakan plaintif terhadap defendan kedua hingga keempat sebagai penjamin dan

- A penghutang utama. Sekiranya mahkamah memeriksa tingkah laku pihak-pihak, mahkamah akan terlibat dalam isu-isu yang berada di luar perintah MR. Isu yang akan dibicarakan di Mahkamah Tinggi adalah terhadap terma di dalam perintah MR, kerana keputusan MR mengikat Mahkamah Tinggi (lihat perenggan 20–22).
- B (2) Adalah menjadi undang-undang mantap bahawa selagi saksi yang mempunyai pengetahuan dari dokumen-dokumen yang dia mempunyai akses kepadanya, sepanjang pekerjaannya sudah cukup untuk membuktikan saksi tersebut mempunyai pengetahuan yang mencukupi berdasarkan kandungan dan maklumat yang diekstrak dari dokumen-dokumen tersebut untuk memberi keterangan di mahkamah. Saksi tidak semestinya mempunyai pengetahuan peribadi sebenar mengenai dokumen tertentu untuk memberi keterangan di mahkamah berhubung dengan dokumen-dokumen tersebut, terutamanya apabila
- C pihak di dalam dokumen tersebut adalah sebuah syarikat atau institusi kewangan. Hal ini kerana pekerja atau pegawai yang mengendalikan dokumen tersebut boleh bersara atau tidak lagi berada dalam pekerjaan apabila pertikaian timbul dari dokumen tersebut. Mahkamah berpendapat bahawa defendan cuba membangkitkan isu-isu yang berada di luar bidang kuasa mahkamah. Oleh itu, perkara yang dibangkitkan oleh defendan kedua hingga keempat tidak dapat dipertahankan (lihat perenggan 23).
- D (3) Mahkamah berpendapat bahawa apabila perkara ini diarah untuk didengar semula ke Mahkamah Tinggi, Mahkamah Rayuan telah dengan jelas menghadkan Mahkamah Tinggi kepada hanya satu isu yang akan dibicarakan, iaitu sama ada klausa 2.8 perjanjian *Ijarah* tersebut adalah patuh Syariah. Sekiranya defendan, termasuk defendan keempat, tidak berpuas hati dengan keputusan perintah MR untuk menghadkan isu tersebut untuk dibicarakan apabila kes plaintif dihantar kembali ke
- E Mahkamah Tinggi, maka mereka boleh meminta kebenaran untuk merayu terhadap perintah MR. Isu yang akan dibicarakan adalah terhadap kepada isu yang terkandung di dalam perintah MR. Selanjutnya, isu yang dipersoalkan sebenarnya telah dijawab oleh MPS. Oleh itu, plaintif adalah betul apabila menghujahkan bahawa plaintif berhak untuk memasuki penghakiman terhadap defendan kedua hingga keempat tanpa perlu mendengar keterangan defendan kedua hingga keempat. Defendan kedua hingga keempat tidak boleh membangkitkan isu lain dan harus mematuhi terma di dalam perintah MR tersebut (lihat perenggan 26–27).
- F (4) Mahkamah berpendapat bahawa walaupun Mahkamah Tinggi sebelum ini dan MR telah mempertimbangkan tiga isu tersebut, hakim-hakim telah mengambilkira isu-isu tersebut di dalam konteks penghakiman terus sebagai isu yang boleh dibicarakan. Merit ketiga-tiga isu tersebut
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belum diputuskan oleh MR. Oleh itu, prinsip res judicata tidak terpakai. Selepas mengambilkira keterangan di hadapan mahkamah mengenai tiga isu yang dibangkitkan dalam tuntutan balas defendan pertama, mahkamah memutuskan bahawa defendan pertama gagal membuktikan tuntutannya terhadap plaintif melalui keseimbangan kebarangkalian (lihat perenggan 32–33).]

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Cases referred to

CIMB Bank Bhd v Anna Wee Chiaw Sek @ Nur Anisa [2016] 11 MLJ 96, HC (refd)

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Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

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JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561; [2019] 5 CLJ 569, FC (refd)

Legislation referred to

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Central Bank of Malaysia Act 2009 ss 56, 57

Samuel Tan (Tee Wei Herng with him) (Shook Lin & Bok) for the plaintiff.

Dinesh Nandrajag (Nandrajog) for the first and second defendants.

Mohd Hakimi (Hakimi & Partners) for the third defendant.

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Nurnadiyah Zaini (Saiful, Roger & Co) for the fourth defendant.

Choo Kah Sing J:**INTRODUCTION**

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[1] The plaintiff's claim against the first defendant is premised on a string of Islamic financing facilities agreements entered into between the parties; whereas the plaintiff's claims against the second to fourth defendants are premised on two directors' guarantee and indemnity agreements given to the plaintiff by the said defendants in relation to the Islamic financing facilities. On 23 September 2020, the plaintiff and first defendant entered a consent judgment for a sum of RM87,388,654.20 as at 30 March 2018.

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[2] The trial of this action went on for only one day on 1 March 2021. On 25 March 2021, this court delivered its decision in favour of the plaintiff's claims against the second, third and fourth defendants, and dismissed the first defendant's counterclaim. The reasons for the decisions are set out as below.

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A BACKGROUND FACTS

[3] The plaintiff is a financial institution which had between the period January 2008 and June 2009 granted multiple Islamic financing facilities to the first defendant.

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[4] The plaintiff's first letter of offer dated 31 January 2008 offered the first defendant the following financing facilities:

C	i.	Murabah Tawarruq Contract Financing (MTQ Contract Financing)	RM5,000,000
	ii.	Ijarah Muntahiah Bitamlik 1 (Ijarah 1)	RM5,192,500
	iii.	Ijarah Muntahiah Bitamlik 3 (Ijarah 3)	RM45,191,500
D	iv.	Ijarah Muntahiah Bitamlik 4 (Ijarah 4)	RM15,753,375
	v.	Ijarah Muntahiah Bitamlik 5 (Ijarah 5)	RM56,648,500

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[5] The plaintiff's second letter of offer dated 22 July 2008 offered to increase the limit of the *Ijarah* 3 from RM45,191,500 to RM56,648,500 which resulted in the granting of the *Ijarah* 5 facility. Subsequently, on 9 June 2009, the plaintiff's third letter of offer offered to increase the MTQ Contract Financing limit from RM5m to RM10m (MTQ Contract Financing-i 2). All the financing facilities granted in the three letter of offers shall collectively be referred to as the 'Islamic Financing Facilities'. The plaintiff and the first defendant entered into multiple agreements relating to the Islamic Financing Facilities, including the Master Facilities Agreement dated 22 February 2008, Supplemental Facilities Agreement dated 1 July 2009 and MTQ Contract Financing-i Facility Agreement dated 1 July 2009. All agreements arising from the Islamic Financing Facilities shall hereafter be referred to as 'the Islamic Financing Agreements'.

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[6] The second to fourth defendants executed two 'Joint and Several Directors Guarantee and Indemnity Agreement' dated 22 February 2008 and 1 July 2009 respectively ('guarantees') in favour of the plaintiff. The second to fourth defendants did not merely guarantee the repayment of the Islamic Financing Facilities but stood respectively as a principal debtor for the repayment of the money due and payable under the Islamic Financing Facilities by the first defendant upon demand.

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[7] The defendants provided to the plaintiff, inter alia, debentures, assignment of contract proceeds, charge over company shares and several

vessels in consideration for the Islamic Financing Facilities granted to the first defendant. All the Islamic Financing Facilities were fully drawn down and utilised by the first defendant. It is not in dispute that the first defendant had defaulted in the repayment of the Islamic Financing Facilities. Likewise, the second to fourth defendants had also defaulted in making payment to the plaintiff upon demands made against them by the plaintiff's solicitors.

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[8] On 2 September 2013, the plaintiff initiated this suit against the defendants. The plaintiff sought for summary judgment to be entered against the defendants. On 3 October 2014, the earlier High Court allowed the plaintiff to enter summary judgment against all the defendants ('the summary judgment').

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[9] Dissatisfied with the High Court's decision, the defendants appealed to the Court of Appeal. One of the issues relied on by the defendants was whether the plaintiff was permitted under Shariah to transfer the obligation to pay for the major maintenance works of two vessels, namely MMS Pahlawan and MMS Pahlawan 3, to the first defendant. The defendants challenged cl 2.8 of the *Ijarah* agreements which provides that the customer, ie the first defendant, shall undertake all the major maintenance work and bear all the costs, charges and expenses therein, as not Shariah compliance, and therefore, the plaintiff was not entitled to its claim in respect of the *Ijarah* rentals when the vessels were out of service. The first defendant also alleged that since the plaintiff had failed to carry out and pay the major maintenance work of the vessels, as a result, the vessels were out of service. Consequently, the first defendant could not pay for the *Ijarah* rentals.

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[10] At the Court of Appeal, the Court of Appeal set aside the summary judgment and remitted the matter back to the High Court, and ordered as follows:

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- (a) Rayuan ini dibenarkan dan perkara ini akan dikembalikan ke Mahkamah Tinggi di Shah Alam untuk dibicarakan di hadapan Hakim Mahkamah Tinggi yang lain;
- (b) Bicara di Mahkamah Tinggi Shah Alam hanya akan melibatkan persoalan sama ada Klausula 2.8 dalam Perjanjian-perjanjian Kemudahan Ijarah selaras dengan Shariah. Suatu rujuk perlu dibuat kepada Majlis Penasihat Shariah (Shariah Advisory Council) berkenaan persoalan ini.

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(the COA's order')

[11] When the matter was remitted back to the High Court before a different judge, a reference was made to the Shariah Advisory Council ('the SAC') pursuant to s 56 of the Central Bank of Malaysia Act 2009 on 18 May 2016. The reference was in respect of the question raised in para (b) of the COA's order. On 30 June 2016, the SAC answered the question in the positive,

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A ie cl 2.8 was Shariah compliant. Pursuant to s 57 of the Central Bank of Malaysia Act 2009, the SAC's ruling is binding on the High Court.

B [12] The first defendant was not satisfied with the ruling of the SAC, and filed a referral application to challenge the constitutionality of ss 56 and 57 of the Central Bank of Malaysia Act 2009. The High Court dismissed the referral application on 22 August 2016. The first defendant filed an appeal to the Court of Appeal. The Court of Appeal allowed the appeal and ordered the High Court to refer the constitutional question to the Federal Court.

C [13] On 28 August 2018, the Federal Court heard the referral application, and on 10 April 2019 decided, inter alia, by a majority of five to four that ss 56 and 57 of the Central Bank of Malaysia Act 2009 are valid and constitutional (see *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569).

D [14] After exhausting all its legal avenues, the first defendant had failed in its challenge against the legality of the Islamic Financing Agreements. The first defendant did not proceed to defend the plaintiff's claim at the High Court. On 23 September 2020, the plaintiff and first defendant entered a consent judgment for a sum of RM87,388,654.20 as at 30 March 2018.

E [15] Consequently, the plaintiff's claims in the main suit to be tried by this court were confined to the plaintiff's claims against the second to fourth defendants in relation to the liability under the guarantees. With regard to the first defendant's counterclaim, this High Court proceeded to hear the counterclaim together with the plaintiff's claims against the second to fourth defendants.

THE FINDING OF THIS COURT

The plaintiff's claims against the second to fourth defendants

H [16] At the trial, the plaintiff proceeded to adduce all the relevant Islamic financing agreements and the guarantees as documentary evidence in order to prove its case against the second to fourth defendants on a standard of balance of probabilities.

I [17] The plaintiff through its only witness had also produced a certificate of indebtedness (as at 18 November 2019) showing the latest outstanding amount of RM91,011,673.84 owing to the plaintiff by the second to fourth defendants.

[18] The plaintiff's counsel submitted that when the Court of Appeal remitted the plaintiff's action back to the earlier High Court, it ordered the High Court to try only one issue, which was the issue stated in para (b) of the COA's order. As such, this present High Court hearing the main suit is bound by the COA's order to try this issue — whether cl 2.8 of the *Ijarah* Agreements was Shariah compliant, and, that question of Shariah compliance had already been determined by the SAC. The Federal Court had affirmed and determined that it is constitutional and legal for the SAC's ruling to bind the High Court. Hence, there was nothing for this court to determine as there was no other issues left to be tried against the second to fourth defendants. Hence, judgment should be entered against the second to fourth defendants.

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[19] Essentially, the second to fourth defendants raised three main issues in their defence to the plaintiff's action. First, the defendants' counsel submitted that this court should not accept the certificate of indebtedness on its face value, instead the court must take into account and consider the conduct of the parties throughout the process of the agreements to determine whether the plaintiff had acted in bad faith and/or unconscionably which could estop the plaintiff from seeking the reliefs claimed.

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[20] This court could not agree with the defendants' counsel submission, because article 2(o) of the guarantees provides a conclusive evidence clause referring to a statement or certificate of indebtedness of the sum owing. As long as the certificate of indebtedness has been duly certified by the plaintiff's authorized officer it shall be sufficed to prove the amount stated therein as owing to the plaintiff by the guarantors, ie the second to fourth defendants (see *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282).

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[21] The Federal Court held that a certificate of indebtedness 'excuses the plaintiff from adducing proof of debt,' and that 'such a certificate shifts the burden onto the defendant to disprove the amount claim' (see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 (FC)). The second to fourth defendant did not disprove the amount in the certificate of indebtedness at the trial.

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[22] Further, this court could not agree that the court should examine the conduct of the parties throughout the process of the agreements to determine whether the plaintiff had acted in bad faith in relation to the plaintiff's action against the second to fourth defendant as the guarantors and principal debtors. If this court were to examine the conduct of the parties, this court would have engaged itself in issues which were outside of the ambit of the COA's order. The issue to be tried in this High Court is confined to that direction in the COA's order, as the ruling of the Court of Appeal binds this High Court.

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- A [23] The second issue raised by the defendants was that the plaintiff's sole witness did not have personal knowledge of the documentary evidence as she was not the person who handled those facilities agreements and documents at the material times. This court could not agree with the submission because it is trite law that as long as the witness is able to obtain his/her knowledge from the contemporaneous documents which he/she has access to them, and that he/she is tasked to take charge of the matter in his/her course of employment, this would suffice to say that the witness could have acquired sufficient knowledge based on the contents and information extracted from those documents to give evidence in court (see also *CIMB Bank Bhd v Anna Wee Chiaw Sek @ Nur Anisa* [2016] 11 MLJ 96). It is not necessary a witness must have actual personal knowledge over certain documents in order to be qualified to give evidence in court in relation to those documents in question, particularly when a party to the documents is a corporation or financial institution. This is because the employee or officer handling the documents could have retired or could no longer be in the employment when a dispute arises from the said documents. Further, the second to fourth defendants' counsel attempted to draw inferences that the officers who had handed those facilities agreements could have acted in bad faith in handling the first defendant's requests in relation to the repayment of the facilities, and therefore, the plaintiff's sole witness was not qualified to give evidence for the plaintiff. This court is of the considered view that the defendants were attempting to raise issues which were outside the purview of this court. Hence, the complaint raised by the second to fourth defendants was unsustainable.
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- E
- F [24] The third issue raised, particularly in the fourth defendant's counsel's submission, was that the defendants were not precluded from raising new issues to be tried at this High Court because the Court of Appeal had set aside the whole decision of the previous High Court, ie the summary judgment. This means that the Court of Appeal did not allow the plaintiff's claim as a whole, not in part. It also means, the second to fourth defendants were allowed to raise other issues when the matter was remitted back to the High Court for trial. It was the fourth defendant's counsel's submission that since the appeal was allowed in whole, therefore, the plaintiff's case against the second to fourth defendant had yet to be decided, and the defendants should be given the right to present their cases. The fourth defendant's counsel also submitted the issue that the fourth defendant had already resigned from the first defendant company when the restructuring of the financing facilities took place.
- G
- H
- I [25] The plaintiff's counsel submitted that the defendants had raised various issues, including those issues raised in the defendants' defences as well as the complaint that the fourth defendant had already resigned from his post when the restructuring of the financing facilities took place, at the Court of Appeal, and all those issues had been ventilated at the Court of Appeal. The plaintiff's

counsel further submitted that the Court of Appeal then decided that all those issues raised at the appeal were not triable issues, except the issue whether cl 2.8 of the *Ijarah* agreements was Shariah compliant. It was on this footing that the Court of Appeal remitted the matter back to be determined at the High Court.

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[26] With regard to the complaint that the second to fourth defendant should be given the right to raise new issues at the High Court when the matter was remitted back after the appeal was allowed by the Court of Appeal, this court is of the considered view that when the matter was remitted back to the High Court, the Court of Appeal had clearly confined the High Court to only one issue to be tried, ie whether cl 2.8 of the *Ijarah* agreements was Shariah compliant. Hence, the fourth defendant's counsel's submission is misconceived. In the event the defendants, including the fourth defendant, were not satisfied with ruling of the COA's order to limit the issue to be tried when the plaintiff's case was remitted back to the High Court, then they could have sought leave to appeal against the COA's order. In so far as this High Court is concerned, the issue to be tried was limited to that as stated in the COA's order.

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[27] Further, the issue in question has in fact been answered by the SAC. Therefore, it is correct for the plaintiff to say that the plaintiff was entitled to enter judgment against the second to fourth defendants without need to hear the evidence of the second to fourth defendants. The second to fourth defendants could not raise any other issue and had to abide by the ruling in the COA's order.

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[28] Whatever issues and defences raised by the second to fourth defendants in their statements of defence had been ventilated and determined by the Court of Appeal after it had scrutinised the reasoning of the then High Court before it decided to set aside the summary judgment.

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[29] The Court of Appeal had set aside the then High Court's Order, ie the summary judgment, and remitted the matter to the High Court to try only one issue which the Court of Appeal was of the view ought to be tried (or was a triable issue). That issue that ought to be tried had been finally determined and disposed by the SAC's ruling. The SAC's ruling binds the High Court, and this legal proposition has been affirmed by the apex court. Hence, the third issue raised was not sustainable.

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The first defendant's counterclaim

[30] Basically, there are four issues to be tried in the first defendant's counterclaim, and the four issues are as follows:

- A** First issue: Whether the plaintiff has to refund a sum of RM1,344,700.00 to the first defendant being monies paid by the first defendant under the a bank guarantee (called by AJM);
- Second issue: Whether the plaintiff is entitled to demand for the rental for MMS Pahlawan 3 (under Ijarah 5) which remained inactive and/or unused for 3 months
- B** (due to fire) and/or for any other vessel which remained inactive or unused (due to unforeseen circumstances or extended dry-docking);
- Third issue: Whether the plaintiff is entitled to withhold the proceeds of sale of MMS Gagah amounting to RM7,682,875.87 for the purposes of future instalments;
- C** Fourth issue: Whether the plaintiff had acted in bad faith when refusing to take into consideration the Financial Review report prepared by Pricewaterhouse Coopers Advisory Services Sdn Bhd ('PWC') in regard to the financial position of the first defendant.
- D**
- E** [31] The plaintiff's counsel submitted that issues 2, 3 and 4 had been raised and argued before the earlier High Court during the summary judgment application as well as at the hearing at the Court of Appeal. The Court of Appeal had considered the three issues raised by the defendants while defending the summary judgment, despite the issues being part of the first defendant's counterclaim. In short, the three issues had been ventilated, argued and decided at the High Court and the Court of Appeal. It is trite law that a matter that has been adjudicated by a competent court could not be re-litigate again by the same parties — the principle of *res judicata*, the plaintiff's counsel
- F** submitted.
- [32] This court is of the view that even if the earlier High Court and the Court of Appeal had considered the three issues, they had considered them in the context of the summary judgment as triable issues or otherwise. The merits of the three issues have not been finally decided by the Court of Appeal. Hence,
- G** *res judicata* does not apply.
- [33] After considering the evidence before the court on the three issues raised in the first defendant counterclaim, this court is not convinced that the first
- H** defendant has proved its claim on a balance of probabilities.
- [34] With regard to the second issue, the first defendant insisted that the plaintiff should not continue to demand for the lease rental when the vessel MMS Pahlawan 3 was suspended or out of order. The answer to this was simple
- I** — on what basis was the first defendant relying for its argument that the plaintiff could not demand for the lease rental when the vessel was inactive? The first defendant's counsel submitted that 'the plaintiff unconscionably claimed rental' for the vessel, and therefore, the plaintiff 'must be liable to repay the three months rental sum to the first defendant'. This court is of the

considered view that the first defendant's counterclaim on this issue was not substantiated with or supported by any legal principle.

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[35] With regard to the third issue, the first defendant's complaint was that the balance of the proceeds of the sale of the vessel MMS Gagah amounting to RM9,246,498.49, after the plaintiff had deducted a sum for the settlement of two facility agreements, was not returned to the first defendant, instead the plaintiff placed the said balance sum in a suspended account. The plaintiff could have utilised the said balance sum to settle some other outstanding facilities. This court could not accept the first defendant's argument. The plaintiff had acted in accordance with the terms of the supplemental letter of offer dated 1 July 2011 which provides the plaintiff with the discretion as to how to utilise the monies. The submission advanced by the first defendant could not go to prove any breach of contract on the part of the plaintiff. The first defendant could not challenge the plaintiff's action merely because the action taken was not in accordance with the first defendant's wishes.

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[36] With regard to the fourth issue, the mere fact that the plaintiff did not accept the financial review report, did not mean that the plaintiff had acted in bad faith. There is no contractual obligation for the plaintiff to be bound by the recommendation in the financial review report. The first defendant's complaint is unsustainable.

E

[37] With regard to the first issue, the first defendant's complaint was that the plaintiff had wrongfully paid the Kalafah Bank Guarantee to AJM Shipping Pte Ltd in the sum of RM1,344,701 upon a demand (dated 8 May 2013) that was made to the plaintiff. The contention was that the first defendant had a back to back agreement with AJM Shipping Pte Ltd and Shapadu Energy and Engineering Sdn Bhd. This court could not agree with the first defendant's submission.

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[38] First, as submitted correctly by the plaintiff's counsel, the guarantee provided by the plaintiff to AJM Shipping Pte Ltd was an unconditional demand guarantee. When the demand was made, the plaintiff was contractually duty bound to make payment (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd* (formerly known as *Maltran Air Services Corp Sdn Bhd*) and another appeal [1996] 2 MLJ 517 (FC)). It was in evidence that the plaintiff did inform the first defendant about AJM Shipping Pte Ltd's demand. The first defendant could have attempted to stop the payment by seeking an injunction against the calling of the demand guarantee by AJM Shipping Pte Ltd.

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[39] Secondly, the first defendant was fully aware the monies to be used to pay the demand guarantee was from the monies in the sums of RM513,430.20 and RM890,348.75 that the first defendant had deposited earlier with the

A plaintiff. The first defendant had via its solicitor's letter dated 13 June 2013 stated that the said monies were to be utilised to settle the claim of the demand guarantee by the plaintiff against the first defendant.

B [40] Thirdly, the plaintiff was not bound by the back to back agreement between the first defendant and AJM Shipping Pte Ltd and Shapadu Energy and Engineering Sdn Bhd. The first defendant should direct its losses at AJM Shipping Pte Ltd or Shapadu Energy and Engineering Sdn Bhd.

C [41] Lastly, the first defendant had no legal basis to insist that the plaintiff pay out the demand guarantee to AJM Shipping Pte Ltd from the Escrow Account. This is because the withdrawal of the monies in the Escrow Account was only meant for specific purposes. Any other payments like the payment on the demand guarantee was not within the terms of the specific purposes for the Escrow Account. Hence, the plaintiff had rightly rejected the first defendant's request. Based on the above, the court's answer to the first issue is in the negative.

E [42] After having scrutinised the evidence adduced by the first defendant for the first defendant's counterclaim, this court could not find any merit in the first defendant's counterclaim which could warrant a judgment to be given against the plaintiff.

CONCLUSION

F [43] For the reasons stated above, this court allowed the plaintiff to enter judgment against the second to fourth defendants, and dismissed the first defendant's counterclaim. This court ordered each defendant to pay costs of RM4,000 (subject to allocator's fees) to the plaintiff.

G *Plaintiff's claim against the second to fourth defendants allowed, and first defendant's counterclaim dismissed.*

Reported by Muhamad Azham Marwan

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